Supreme Court, U.S.
FILED
081364 JAN 26 2009
OFFICE OF THE CLERK

127

(1)

No.

in the

Supreme Court

of the

United States

Term,

ORLANDO YUNQUE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Kevin M. Schad
1001 W. Main St. Suite F
Lebanon OH 45036
513.933.9333

Counsel for Petitioner

QUESTIONS PRESENTED

I.

Is Due Process violated when a key defense witness is prevented from entering the country by the United States?

II.

Where the purported leader of the conspiracy provides an affidavit recanting his testimony, and exonerates the Petitioner, is the Petitioner entitled to an evidentiary hearing?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
1. Due Process requires that accommodation be made to allow,in some form, testimony from a witness who is prevented from entering the country to testify for a criminal defendant due to deportation	5
2. Because the witnesses' testimony, on its face, created a likelihood of a different result at trial, a hearing was required	6
CONCLUSION	9
APPENDIX	X

TABLE OF AUTHORITIES

	Page
Phillips v. United States, 238 Fed Appx. 89 (6th C. 2007)	7
United States v. Stephen, 50 Fed.Appx. 102 (4th C. 2002)	7
United States v. Witherspoon, 231 F.3d 923(4th C. 2000)	7
United States v. Yida, 498 F.3d 945 (9th C. 2007)	6
Valentine v. United States, 488 F.3d 325 (6th C. 2007)	7
Washington v. Texas, 388 U.S. 14,19 (1967)	5

No.

in the

Supreme Court

of the

United States

Term,

ORLANDO YUNQUE,
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Orlando Yunque, respectfully prays that a writ of certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on October 28, 2008.

OPINION BELOW

The Fifth Circuit's opinion on this matter was unpublished, and is attached hereto in Appendix 1. The Judgment of the District Court is unpublished, and attached as Appendix 2. The Magistrate's Report and Recommendation is also unpublished, and attached as Appendix 3.

JURISDICTION

The Fifth Circuit denied the Petitioner's appeal in this case on October 28, 2008. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without due process of law*; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The Petitioner was initially convicted in 1991 of conspiracy to possess with the intent to distribute and aiding and abetting in the distribution of cocaine. As part of the trial in this case, the Government produced the testimony of Mr. Gavaria, a co-conspirator. Mr. Gavaria testified as to the Petitioner's involvement, and was labeled, through his own testimony and the Government's argument, as a leader within the conspiracy. On September 23. 1991, the Petitioner was sentenced to 372 months incarceration, to be followed by 5 years supervised release. An appeal to the Fifth Circuit was subsequently denied, as well as a petition pursuant to 28 U.S.C. § 2255 filed with the district court in 2000.

On January 23, 2006, the Petitioner filed with the Fifth Circuit a motion for successive 2255 petition, alleging that newly discovered evidence from a key Government witness exonerated the Petitioner. The witness, Mr. Gavaria, was the admitted leader of the cocaine conspiracy under which the Petitioner was convicted. Mr. Gavaria provided an affidavit in which he claimed that the Petitioner was not involved in the distribution of any drugs, and that his testimony at the original trial, which implicated the Petitioner, was perjury. On February 24, 2006, the Fifth Circuit found "Yunque's claim of witness recantation at least warrants a fuller explanation by the district court." The matter was then transferred to the district court for further proceedings.

The Petitioner then filed a 2255 petition with the district court, attaching Gavaria's affidavit. The district court set the matter for an evidentiary hearing, indicating that it needed live testimony from Gavaria in order to dispose of the claim. Unfortunately, Mr. Gavaria had been deported by the United States after serving his federal prison time; therefore, he was not

able to re-enter the United States without obtaining a one day parole. This placed Mr. Gavaria at the mercy of the United States, the opposing litigant in this petition.

Numerous attempts were made by the defense to obtain Mr. Gavaria's attendance at an evidentiary hearing. Mr. Gavaria hired counsel in Columbia, and began working with the United States Embassy to obtain permission to travel to the United States for the hearing. Such permission was never obtained. The defense, at one point, suggested that a deposition of Mr. Gavaria be taken, or that the hearing be held in Columbia. This was denied by the magistrate. The Petitioner then filed a motion seeking the assistance and aid of the district court and the United States Attorney's office in obtaining Mr. Gavaria's presence. This too was denied. Eventually, the district court denied the Petitioner's claim without a hearing, based upon the failure to obtain Mr. Gavaria's presence. The magistrate court found that Gavaria was not an available witness, and that "Gavaria's recent revelations are of no consequence".

REASONS FOR GRANTING THE WRIT

1. **Due Process requires that accommodation be made to allow, in some form, testimony from a witness who is prevented from entering the country to testify for a criminal defendant due to deportation**

The Petitioner submits that, as the United States ultimately controlled whether a witness was permitted to enter the country to testify on the Petitioner's behalf, that Due Process requires that the United States assist in the production of the witness. In the alternative, the district court should have allowed presentation of the testimony by some other means, such as deposition or video conference.

First, the right to present a witness is a fundamental Due Process right. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14,19 (1967)

In the present case, the Petitioner sought to introduce evidence from a former Government witness, who was a leader of the conspiracy. This witness provided an affidavit that indicated: (1) contrary to his trial testimony, the Petitioner was not involved in the offense, and (2) that he was forced to commit perjury due to the actions of the prosecuting attorney. Such testimony would certainly have been relevant to the case, and would have had an outcome in the

proceedings.

However, despite the district court actually setting the matter for a hearing on several occasions, it was not able to hear the testimony of the witness. This was due to the fact that the United States would not allow the witness back into the country. Having knowledge of the problems in bringing this willing witness into the United States, the magistrate judge denied any other way to bring the witnesses testimony before the court. The court also refused a motion to require the United States to allow or assist in the procurement of a one day parole for the witness, so that his testimony could be provided.

In the case of *United States v. Yida*, 498 F.3d 945 (9th C. 2007), the Government sought to use the former testimony of a witness who had been deported. The defense argued that the Government was required to utilize reasonable means to obtain the attendance of the witness. The Ninth Circuit agreed, finding that the Government's failure to use any means, such as process or use of video deposition, were not reasonable, especially in light of the fact that the Government controlled the witness. The Court noted "Prosecutors must not only act in good faith but also operate in a competent manner; a prosecutor cannot claim that a witness is unavailable because the prosecutor has acted in an 'empty-head pure-heart' way." *Id.* at 953

In the present case, the Petitioner's Due Process right to present a key witness in his defense was stymied by the United States. As such, the case must be remanded, with instructions to allow the defense to present this witness.

2. **Because the witnesses' testimony, on its face, created a likelihood of a different result at trial, a hearing was required**

The district court, after setting this matter for an

evidentiary hearing on several occasions, eventually ruled on the Petitioner's claim without a hearing, finding that Gavaria's testimony would not have made a difference in the case.

An evidentiary hearing is warranted unless "the motion and the files and the records of the case conclusively show that the petitioner is entitled to no relief . . ." *United States v. Witherspoon*, 231 F.3d 923,925 (4th C. 2000) In *Witherspoon*, the district court had denied the § 2255 petition based upon the pleadings and affidavits of the parties. The Court held that because the affidavits did not conclusively determine the issue, a hearing was warranted. *Id.* at 927 Where relevant facts necessary to the disposition of the claims are in dispute, a hearing must be held. *Phillips v. United States*, 238 Fed Appx. 89,96 (6th C. 2007)

In the case of *United States v. Stephen*, 50 Fed.Appx. 102 (4th C. 2002), the defendant filed a 2255 petition challenging his counsel's assistance with regards to his plea. The defendant submitted affidavits in support of his petition. The petition was denied without a hearing. The Fourth Circuit remanded for a hearing, finding that because the record did not conclusively show that the defendant could not obtain relief, a hearing was warranted.

In the case of *Valentine v. United States*, 488 F.3d 325 (6th C. 2007), the Sixth Circuit found that a district court had abused its discretion in failing to hold an evidentiary hearing. In that case, the defendant claimed that he would have accepted a plea bargain, but for counsel's actions. The district court denied this claim without a hearing, contending that the defendant's actions during trial indicated that he would not have accepted the plea. The Court found, however, that the defendant "offers more than a mere assertion of his innocence; he presents a factual narrative of the events that is neither contradicted by the record nor

"inherently incredible." His claim may prove false at the evidentiary hearing, but it is impossible to assess its veracity based on this record alone. The purpose of the hearing, however, is to allow the court to make these factual determinations based on more than a defendant's affidavit and the contrary representations of the government. Therefore, we reverse the district court's judgment on this issue and remand for an evidentiary hearing on this claim." *Id.* at 334

In the Petitioner's case, the proposed testimony of Gavaria was not inherently credible on its face. Further, the face of the record could not have conclusively refuted the claim: both the Fifth Circuit and the district court (initially) determined a hearing was necessary. A reasonable jury, hearing from the leader of the conspiracy, that the Petitioner was not involved, may have well chosen to credit this testimony, and exonerate the Petitioner. On this basis, a hearing should have been held.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand for further proceedings.

Respectfully submitted,

Kevin M. Schad
Attorney for Petitioner
Schad & Schad
1001 W. Main St.
Lebanon OH 45036
(513) 933-9333

APPENDIX

1. COURT OF APPEALS ORDER October 28, 2008
2. DISTRICT COURT ORDER, February 7, 2008
3. MAGISTRATE'S REPORT, January 17, 2008

Appendix 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-40229
USDC No. 3:06-CV-394
USDC No. 4:91-CR-23-1

UNITED STATES OF AMERICA

v.

ORLANDO YUNQUE

Appeal from the United States District Court
for the Southern District of Texas

ORDER:

Orlando Yunque, federal prisoner #56790-079, seeks a certificate of appealability (COA) to appeal the denial of his 28 U.S.C §2255 motion, wherein he challenged his conviction for aiding and abetting the possession with intent to distribute cocaine and conspiracy.

A COA may issue only if Yunque "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Yunque argues that he is entitled to a new trial because (1) government witness has submitted an affidavit purporting to recant his trial testimony, and (2) the district court refused to order the Government to assist Yunque in obtaining a visa for that witness, who had previously been deported, to enter the country and testify at a hearing on his §2255 motion, or to allow the witness to testify remotely at the hearing through alternative means. Yunque has not shown "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel, 529 U.S. 473, 484 (2000).*

Accordingly, the request for COA is DENIED.

THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE

Appendix 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

United States of America

versus — Criminal H-91-23 (I)

Orlando Yunque
(Ancillary Civil Action G-06-394)

Order of Adoption

Having considered the report and recommendation (215) of Magistrate Judge John R. Froeschner and the objections of Orlando Yunque (216), the court adopts the report and recommendation as this court's order.

The United States' Motion for Summary Judgment is granted. (200)

Orlando Yunque's motion to vacate under 28 U.S.C. 2255 is dismissed. (193)

Signed on February 7, 2008 at Houston, Texas.

Lynn N. Hughes
United States District Judge

Appendix 3

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA

V.

CRIMINAL NO. H-91-23 (01)

CIVIL ACTION NO. G-06-394

ORLANDO YUNQUE

REPORT AND RECOMMENDATION

Before the Court, by referral from the Honorable Lynn Hughes, United States District Judge, is the Motion for Summary Judgment of the United States. The Motion supercedes the Government's previously filed Motion to Dismiss and seeks the denial of the " Motion Under 28 U.S.C. § 2255 of Orlando Yunque. This Court, having carefully considered all of the

Parties' submissions and the record of prior proceedings now submits this Report and Recommendation to the District Court.

Yunque is presently serving a sentence of 372 months as a result of his convictions for conspiracy and possession with intent to distribute more than 5 kilograms of cocaine. On February 24, 2006, the United States Court of Appeals for the Fifth Circuit gave Yunque permission to file a successive Motion under 28 U.S.C. § 2255 for "further exploration" of his claim that his co-conspirator Omar Alonso Gaviria Rojas (Gaviria), who testified on behalf of the Government at Yunque's trial, had recanted his incriminating testimony. The successive Motion was filed on June 13, 2006; it sought a new trial on the basis of the newly discovered evidence of Gaviria's recantations. Attached to Yunque's Motion was an affidavit from Gaviria, who now resides in his native country of Colombia, South America, to which he had been deported following the completion of his prison sentence. In his affidavit Gaviria indicates, inter alia,

that he is willing to return to the United States to offer his "new" testimony in support of Yunque's Motion.

To "further explore" Gaviria's recantation, this Court felt an Evidentiary Hearing was appropriate and one was set for March 28, 2007. When Yunque's attorney was unable to procure a parole from the Department of Homeland Security for Gaviria's readmission for attendance at the Hearing, the Evidentiary Hearing was reset, on Yunque's Motion, to June 6, 2007. It was subsequently reset, for the same reason, to August 29, 2007. That setting also had to be vacated because no parole was issued for Gaviria. Thereafter, at a Status Conference on October 26, 2007, the Evidentiary Hearing was again reset to January 16, 2008. In anticipation of the recurring problem with Gaviria's parole, this Court initiated a pre-hearing conference by telephone, with counsel of record. During the conference, Yunque's attorney, who resides in Ohio, informed the Court that there was no likelihood that Gaviria would be granted a parole and that Gaviria's

testimony was the only evidence that he intended to offer at the Evidentiary Hearing. Since further delay appeared fruitless, this Court, with the agreement of counsel, cancelled the upcoming Hearing and informed counsel that it would, barring issuance of an eleventh hour parole, address the merits of Yunque's Motion after January 16, 2008, without the aid of an Evidentiary Hearing.

Yunque was indicted together with four alleged co-conspirators, including Gaviria. The facts developed at the trial that resulted in Yunque's conviction are accurately recited at great length by the Government in its Motion to Dismiss (Inst. No. 197). However, under the present circumstances of this proceeding the relevant facts can be very easily summarized. Following a tip, surveillance was conducted on several individuals and three residences in Houston, Texas, including a house on Briarwest Circle. During the surveillance Yunque was seen meeting with some of his co-conspirators and entering and exiting the residence

on Briarwest. On one occasion he was actually seen carrying a box out of the residence and putting it in the trunk of a car. That car was stopped as soon as it was driven away and a consensual search of the box uncovered 24 kilograms of cocaine. During later searches of the residences, which uncovered multiple kilograms of cocaine, Yunque's fingerprints were found on some seized documents indicative of drug trafficking.

More germane to Yunque's Motion, the Government also offered the testimony of Gaviria, who had previously pleaded guilty and agreed to cooperate with the Government in return for the substantial sentence reduction he later received. Gaviria testified, inter alia, that he overheard Yunque's discussions with his co-conspirators about drug trafficking and in particular a 100 kilogram transaction. He also testified he actually saw Yunque removing a quantity of cocaine from a storage box. It is this testimony Gaviria, after serving his substantially reduced sentence, wishes to recant. Now Gaviria avers that until the day of his

arrest he had never before seen Yunque; that he never had any dealing with Yunque; and that he invented the incriminating stories under pressure from his own attorney and the prosecutors.

Unfortunately, for Yunque, Gaviria's recent revelations are of no consequence. Recanting witnesses must normally be treated with extreme caution, United States v. Gresham, 118 F. 3d 258, 267 (5th Cir 1997), and, in the opinion of the Court, Gaviria's affidavit is completely useless. An affidavit is nothing more than written hearsay under oath. As a general rule, it is excludable from evidence it offered to prove the truth of the statements contained therein because the trier of fact has not opportunity to observe the appearance and demeanor of the affiant and the affiant is not subjected to cross-examination. If this Court were to convene an Evidentiary Hearing on Yunque's § 2255 Motion , the Federal Rules of Evidence would be applicable, see Fed.R.Evid. 1101(e), and despite Gaviria's unavailability, none of the recognized potential hearsay

exceptions would apply to his affidavit. The affidavit is not a statement against interest under Rul 804(b)(3) because Gaviria's penal interest is no longer at stake, United States v. Atkins, 618 F.2d 366, 373 (5th Cir. 1980); he has served his sentence and a perjury prosecution would be barred by limitation. 18 U.S.C § 3282(a) (5year limitation period for non-capital offenses). The affidavit also lacks that degree of trustworthiness required to render it admissible under Rule 807. Gaviria is a convicted felon whose credibility is already suspect under Rule 609. His recantations occurred almost 15 years after his trial testimony was given. Moreover, nether the Court nor the Government can, from an examination of the affidavit, observe Gaviria's demeanor in order to judge his credibility, or, through cross examination, probe his motivations. Admission of Gaviria's affidavit under Rule 807 would in no way serve the interests of justice in this long closed case. Atkins, 618 F.2d at 372-73.

Since Gaviria's testimony was the only evidence

Yunque intended to introduce in support of his Motion, the exclusion of Gaviria's affidavit makes the disposition of Yunque's Motion relatively simple: Yunque has not new evidence to support his claim of "newly discovered evidence" that the Government secured his conviction with coerced and perjured testimony. While the Court concedes that there is some authority that curable hearsay may be sufficient to avoid summary judgment, Pennington v. Vistron, Corp., 876 F.2d 414, 426 n.15 (5th Cir. 1989), if summary judgment were denied here and an Evidentiary Hearing were held without Gaviria's attendance, the complete absence of admissible evidence of Gaviria's recantations and accusations at the Hearing would entitle the Government to judgment as a matter of law, the sam standard for granting a Motion for Summary Judgment. Celotex Corp. V. Catrett, 477 U.S 317, 326 (1986) (Standard for granting summary judgment mirrors the standard for granting judgment as a matter of law under Rule 50(a)). Such an exercise would be

superfluous; therefore, in the absence of Gaviria's appearance, the Government's Motion for Summary Judgment should be granted.

The Court also feels confident in foregoing an Evidentiary Hearing for another reason: it shares the opinion of the Government that even without Gavira's testimony the evidence offered at trial against Yunque was sufficient to support the Jury's verdicts. In summary, Yunque was first observed on January 22, 1991, engaging in conversation with two co-conspirators in a "vehicle-to-vehicle" meeting. Yunque was seen later that day arriving at the Briarwest residence. The next day Yunque was seen carrying a box full of cocaine from the Briarwest house and placing it in the trunk of a car. The subsequent search of the Briarwest residence uncovered numerous boxes filled with obvious distribution amounts of cocaine and documents shown to be related to drug trafficking bearing Yunque's fingerprints. Consequently, Gaviria's testimony was not, as Yunque claims, the "only hard evidence" against

him at trial. Viewing this evidence in the light most favorable to the prosecution, it is clear that a rational jury could have found Yunque had committed the essential elements of conspiracy and possession of cocaine beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1975). Therefore, even if the Court were convinced Gaviria's trial testimony were false, Yunque would not be entitled to a new trial.

For the foregoing reasons, it is the **RECOMMENDATION** of the Court that the Motion for Summary Judgment of the United States (Instrument no. 200) be **GRANTED** and that the Motion under 28 U.S.C § 2255 (Instrument no. 193) of Orlando Yunque be **DENIED** in its entirety.

The Clerk **SHALL** send a copy of this Report and Recommendation to the Parties who **SHALL** have until **February 8,.2008**, in which to have written objections, filed pursuant to 28 U.S.C. §636(b)(1)©, **physically on file**, in the Office of the Clerk. The Objections SHALL be mailed to the Clerk's Office at P O Drawer 2300,

Galveston, Texas 77553. Failure to file written objections within the prescribed time SHALL bar the Parties from attacking on appeal the factual findings and legal conclusions accepted by the District Judge, except upon grounds of plain error.

DONE at Galveston, Texas, this 17th day of January, 2008.

John R. Froeschner
United States Magistrate Judge